Google, Inc. v. Affinity Engines, Inc. Doc. 42

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GOOGLE, INC., a Delaware corporation, Plaintiff, v. AFFINITY ENGINES, INC., a Delaware corporation, Defendant.	CASE NO: C 05-0598 JW **DEFENDANT'S ANSWER TO AMENDED COMPLAINT** **DEMAND FOR JURY TRIAL**

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Defendant Affinity Engines, Inc. ("AEI") hereby answers the Amended Complaint for Copyright Infringement and Declaratory Relief ("Amended Complaint") of plaintiff Google, Inc. ("Google") as follows:

1. AEI admits that Google purports to have brought an action for copyright infringement against AEI. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 1 of the Amended Complaint.

2. AEI denies each and every allegation contained in Paragraph 2 of the Amended Complaint.

3. AEI admits that Google purports to have brought a claim for declaratory relief regarding ownership of software code. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 3 of the Amended Complaint.

THE PARTIES

4. AEI admits that Google is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Mountain View, California.

5. AEI admits that AEI is a corporation organized and existing under the laws of the State of Delaware. AEI denies that it has a principal place of business in Palo Alto, California.

6. AEI admits that it has made ownership claims in software code used to implement a social networking service and has registered a copyright in that code. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 6 of the Amended Complaint.

JURISDICTION AND VENUE

7. AEI admits that this Court has subject matter jurisdiction over the "First Claim for Relief – Copyright Infringement" in the Amended Complaint, pursuant to 28 U.S.C. §§ 1331, 1338 and the Copyright Act, 17 U.S.C. § 101, *et seq.* to the extent that Federal District Courts have exclusive jurisdiction of copyright infringement claims and otherwise denies subject matter jurisdiction. AEI denies that this Court has subject matter jurisdiction over the "Second Claim for Relief – Declaratory Judgment" pursuant to 28 U.S.C. § 2201 in view of the current pending action *Affinity Engines, Inc. v. Google, Inc. et al.* (Superior Court of the State of California, Santa

Clara County, 104 CV 020368) ("California State Court Action"). AEI continues to preserve all of the arguments that AEI asserted in its "Motion to Dismiss and/or Stay Proceedings" (filed in this Court on March 1, 2005) and preserves all such arguments for appeal.

8. AEI admits that venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claim occurred here, and, AEI resides in this district for purposes of the venue statutes since it is subject to personal jurisdiction in this venue.

INTRADISTRICT ASSIGNMENT

9. AEI admits that, pursuant to Local Rule 3-2(c), because this is an intellectual property case, it may properly be assigned to any division in this district.

FACTUAL BACKGROUND

10. AEI admits that Google provides search services for a variety of web-based applications and admits that Google maintains an online index of websites and other content and makes this information available to anyone with an Internet connection. Except as expressly admitted, AEI lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 10 of the Amended Complaint and on that basis denies the allegations in Paragraph 10.

11. AEI admits that AEI is in the business of providing social networking services to universities through their alumni associations.

12. AEI admits that Orkut Buyukkokten became a concurrent employee of Google and Affinity Engines, Inc. on August 5, 2002.

13. AEI admits that effective August 5, 2002, Buyukkokten signed an employment and inventions assignment agreement with Google. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 13 of the Amended Complaint.

14. AEI denies each and every allegation contained in Paragraph 14 of the Amended Complaint.

15. AEI admits that Buyukkokten, among others at AEI, wrote software code called "inCircle" which implements an online social networking service. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 15 of the Amended Complaint. AEI specifically denies the allegation that Buyukkokten alone wrote inCircle.

16. AEI denies each and every allegation contained in Paragraph 16 of the Amended Complaint.

17. AEI denies each and every allegation contained in Paragraph 17 of the Amended Complaint.

18. AEI denies each and every allegation contained in Paragraph 18 of the Amended Complaint.

19. AEI denies each and every allegation contained in Paragraph 19 of the Amended Complaint.

20. AEI admits that on March 8, 2004, AEI sent a letter to Google in which AEI claimed that AEI, not Google, owned all rights to the inCircle program and claimed that Google had improperly misappropriated, used and copied AEI's trade secret inCircle source code to develop software implementing a social networking service offered by Google called "Orkut.com." Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 20 of the Amended Complaint. AEI specifically denies the allegation that the March 8, 2004 letter claimed that Google had infringed any copyright in the inCircle software.

21. AEI admits that in subsequent meetings between Google and AEI, AEI continued to claim that it owned the inCircle source code, and that Google had improperly misappropriated, used and copied AEI's trade secret inCircle source code. AEI admits that AEI threatened to sue Google for misappropriation of AEI's trade secrets. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 21 of the Amended Complaint. AEI specifically denies the allegation that AEI claimed that Google had infringed any copyright in the inCircle software.

22. AEI admits that on May 25, 2004, AEI filed an action against Google, Orkut.com, LLC, Orkut Buyukkokten and a number of "Doe" defendants, in the Superior Court of the State of California, Santa Clara County. AEI admits that, among other things, AEI alleged that Google had misappropriated trade secrets found in the inCircle source code in order to develop the software implementing Orkut.com. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 22 of the Amended Complaint.

23. AEI admits that AEI obtained a copyright registration in the inCircle software. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 23 of the Amended Complaint.

24. AEI admits that in bringing the lawsuit against Google in California state court, AEI chose not to bring a claim for copyright infringement against Google. AEI admits that AEI refused Google's requests for assurance that AEI will not file a copyright claim against Google in the future.

FIRST CLAIM FOR RELIEF—COPYRIGHT INFRINGEMENT

25. AEI incorporates by reference Paragraphs 1 through 24 from above.

26. AEI denies each and every allegation contained in Paragraph 26 of the Amended Complaint.

27. AEI admits that Google has purported to register a copyright with the United States Copyright Office, Registration No. TX-6079068 on January 21, 2005 after AEI's registration of its copyright in the inCircle software. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 27 of the Amended Complaint.

28. AEI denies each and every allegation contained in Paragraph 28 of the Amended Complaint.

29. AEI denies each and every allegation contained in Paragraph 29 of the Amended Complaint.

30. AEI denies each and every allegation contained in Paragraph 30 of the Amended Complaint.

SECOND CLAIM FOR RELIEF—DECLARATORY JUDGMENT

31. AEI incorporates by reference Paragraphs 1 through 30 from above.

32. AEI admits that in numerous public statements leading up to this lawsuit, including statements made to its existing and potential customers, AEI has claimed all right, title and interest in and to the inCircle software. AEI admits that it has registered a copyright in the inCircle software code and claims ownership of the copyright to such code. AEI admits that it has claimed that Google has no ownership rights in the inCircle software code and no rights to use any of the inCircle software code. Except as expressly so admitted, AEI otherwise denies each and every allegation contained in Paragraph 32 of the Amended Complaint.

33. AEI lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 33 of the Amended Complaint and on that basis denies the allegations in Paragraph 33.

34. AEI disputes (1) Google's purported ownership of the copyright in the inCircle source code, (2) Google's purported license to use the code written by Buyukkokten before August 5, 2002 and (3) the purported invalidity of AEI's copyright registration for the inCircle software code. AEI denies that there is an actual and justiciable controversy conferring jurisdiction. AEI continues to preserve all of the arguments that AEI asserted in its "Motion to Dismiss and/or Stay Proceedings" (filed in this Court on March 1, 2005) and preserves all such arguments for appeal.

RESPONSE TO GOOGLE'S PRAYER FOR RELIEF

1. AEI denies that Google is entitled to any permanent injunction against AEI from copying or distributing any software code or from creating any derivative works of any software code. AEI denies that Google owns any inCircle software code and AEI further denies that Google owns any copyright in any inCircle software code, or any other aspect of inCircle.

2. AEI denies that Google is entitled to any actual damages or profits attributable to purported infringement. AEI denies that Google is entitled to any attorneys' fees; Google's prayer for attorneys' fees was dismissed by Court Order on August 12, 2005.

3. AEI denies that Google is entitled to any declaration that AEI has engaged in any copyright infringement and denies that Google is entitled to any declaration that AEI has engaged in any willful copyright infringement under 17 U.S.C. § 504(c).

4. AEI denies that Google is entitled to any declaration that Google owns the copyright to any and all social networking software and/or source code written by Buyukkokten after August 5, 2002. AEI denies that Google is entitled to any declaration that Google's copyright registration is valid.

5. AEI denies that Google is entitled to any declaration that Google holds any license of any kind to any and all social networking software and/or source code written by Buyukkokten before August 5, 2002 that was incorporated into Google's products, or otherwise.

6. AEI denies that Google is entitled to any declaration that AEI's copyright registration for the inCircle software code written by Buyukkokten after August 5, 2002 is invalid and enforceable.

7. AEI denies that Google is entitled to any award to Google of AEI's profits in any amount.

8. AEI denies that Google is entitled to any award to Google of its costs or expenses of suit incurred and denies that Google is entitled to any attorneys' fees. Google's prayer for attorneys' fees was dismissed by Court Order on August 12, 2005.

9. AEI denies that Google is entitled to any other relief.

10. AEI denies that Google is entitled to be awarded any of the relief sought in its prayer for relief against AEI, its agents, employees, representatives, successors and assigns, and those acting in privity or concert with AEI. Google does not own any copyright or any other rights in the inCircle software code or any other aspect of inCircle. Google does not hold a license to any copyright or any other rights in the inCircle software code or any other aspect of inCircle. AEI has not directly, indirectly, contributorily and/or by inducement, or in any other manner, infringed willfully, or otherwise, any copyright owned by Google or any other right of Google. Google is not entitled to recover actual damages, including any compensatory damages

or accounting, statutory damages, profits, injunctive relief, fees, costs, interest, or any other type of recovery from AEI. Google's prayer should, therefore, be denied in its entirety and with prejudice, and Google should take nothing therefore.

AFFIRMATIVE DEFENSES

Further answering Google's Amended Complaint, AEI asserts the following affirmative defenses. AEI reserves the right to amend its answer with additional defenses as further information is obtained.

First Affirmative Defense

(Ownership)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that Google's request for relief is precluded, in whole or in part, because AEI owns the asserted copyright.

Second Affirmative Defense

(Ownership by Assignment)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that Google's request for relief is precluded, in whole or in part, because AEI owns the asserted copyright by virtue of an assignment of the asserted copyright.

Third Affirmative Defense

(Work for Hire)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that Google's request for relief is precluded, in whole or in part, because AEI owns the asserted copyright by operation of the work for hire doctrine.

Fourth Affirmative Defense

(Lack of Copyright Ownership)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that Google's request for relief is precluded, in whole or in part, because Google does not own, nor is Google a licensee of, the asserted copyright and Google does not own, nor is Google a licensee of, the materials alleged by Google to include its alleged copyrights.

Fifth Affirmative Defense

(Lack of Standing)

AEI alleges that Google lacks standing to assert the Claims for Relief in Google's Amended Complaint because Google does not own, nor is Google a licensee of, the asserted copyright and Google does not own, nor is Google a licensee of, the materials alleged by Google to include its alleged copyrights.

Sixth Affirmative Defense

(Fraud on the Copyright Office)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that Google engaged in fraud on the Copyright Office in that Google's purported copyright registration application for registration No. TX-6-079-068 contains material misrepresentations or omissions made by Google on or about January 18, 2005 relating to the nature, scope, authorship and/or ownership of the copyright at issue, which, on information and belief, in purpose and effect, influenced the Copyright Office's issuance of said registration. Google intentionally made the false representation that it authored the subject work and false representation that "This application is for a work, the earlier registration of which was unauthorized" and these misrepresentations were material in that in their absence the registration would not have issued. The application, so fraudulently or otherwise improperly filed by Google and any resulting registration should be held, as a matter of law or equity, to be invalid and/or unenforceable.

Seventh Affirmative Defense

(Lack of Signed Transfer)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that Google's request for relief is precluded, in whole or in part, because there is no signed transfer to Google as required to support its copyright claims.

Eighth Affirmative Defense

(Copyright Misuse)

AEI alleges as to each Claim for Relief in Google's Amended Complain that Google's claims are barred by the doctrine of copyright misuse.

Ninth Affirmative Defense

(Non-Infringement)

AEI has not and is not now willfully or otherwise infringing, contributorily infringing, vicariously infringing, or inducing infringement of any copyright asserted in Google's Amended Complaint.

Tenth Affirmative Defense

(Failure to State a Claim)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that Google fails to state a claim upon which relief can be granted.

Eleventh Affirmative Defense

(Unclean Hands/Laches/Waiver/Estoppel)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that Google's request for relief is precluded, in whole or in part, under the equitable doctrines of unclean hands, laches, waiver and estoppel.

Twelfth Affirmative Defense

(Fair Use)

AEI alleges as to each Claim for Relief in Google's Amended Complaint regarding a work protected by copyright that any alleged use of such work by it is protected by the doctrine of fair use.

Thirteenth Affirmative Defense

(Authorization)

AEI alleges as to each Claim for Relief in Google's Amended Complaint regarding a work protected by copyright that AEI was authorized by Google to engage in the allegedly infringing conduct.

Fourteenth Affirmative Defense

(License)

AEI alleges as to each Claim for Relief in Google's Amended Complaint regarding a work protected by copyright that AEI obtained a license from Google to engage in the allegedly infringing conduct.

Fifteenth Affirmative Defense

(Abandonment)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that such claims are barred by Google's abandonment of any copyright relating to its products.

Sixteenth Affirmative Defense

(Privilege)

AEI alleges that each Claim for Relief in Google's Amended Complaint is barred because AEI's actions were privileged.

Seventeenth Affirmative Defense

(Lack of Harm)

AEI alleges as to each Claim for Relief in Google's Amended Complaint that such claims should be barred, in whole or in part, because Google has not sustained any losses, damages, detriment, or harm, in any sum or amount whatsoever, as a result of AEI's actions alleged in the Amended Complaint.

WHEREFORE, AEI requests

1. That Google's Amended Complaint be dismissed with prejudice in its entirety and that Google take nothing thereby;
2. That Google's copyright registration be ordered invalid;
3. For an award of attorneys' fees and costs of suit;
4. For such other relief as the Court may deem just and proper.

Dated: August 26, 2005

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ G. Hopkins Guy, III /s/

G. Hopkins Guy, III
Attorneys for Defendant
Affinity Engines, Inc.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, AEI hereby demands trial by jury of all issues so triable.

Dated: August 26, 2005

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ G. Hopkins Guy, III /s/
G. Hopkins Guy, III
Attorneys for Defendant
Affinity Engines, Inc.